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IN THE

Supreme Court of the United States

October Term, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

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1. The Questions Presented Are Correctly Stated in Petitioner's Brief, pp. 2-3.

Respondents contend that the Questions Presented in petitioner's brief are incorrect in two respects:

First, respondents assert that it is not true that petitioner's two vessels come "temporarily into American waters" (Resp. Br., 1, 2). But these vessels do just that. Just like any foreign vessel trading with the United States, they come into American waters for a short period of time to pick up and discharge passengers and cargo. The QUEEN MARY, for example, does precisely that, no matter how regular and continuous may be its participation in foreign commerce with the United States.

Second, respondents also assert that it is not true that the facts are not in dispute (Resp. Br., 2). But there is no dispute as to any fact relevant to the questions here presented, even under the view taken by the United States in its brief as *amicus curiae*. No fact as to foreign registry, foreign flag, foreign ownership, foreign crews serving under foreign articles entered abroad, foreign home port, foreign refitting and repair is challenged by respondents and all are correctly stated in petitioner's brief. Respondents' assertions with respect to the relationship of Incres and the Agency, which are dealt with in point V below, we do not believe to be material.

II. Disregard of the Law of the Flag Would Breed Uncertainty in the Administration of the Internal Order of Foreign Vessels and Invite Conflict Among Nations, As Is Evidenced by the Briefs Filed by Governments as *Amici Curiae*.

Petitioner, of course, welcomes the support of the brief of the United States (hereinafter cited as U. S. Br.) as it does that of the briefs of the governments of the Republic of Liberia (hereinafter cited as Lib. Br.), the Republic of Panama (hereinafter cited as Pan. Br.), the United Kingdom of Great Britain and Northern Ireland (hereinafter cited as U. K. Br.), and those of Canada (hereinafter cited as Can. Br.) and the Republic of Honduras (hereinafter cited as Hon. Br.) in briefs filed in cases Nos. 91, 93 and 107.

We find in these briefs legal arguments that we believe to be decisive of the questions here presented. We refer to the arguments that only one nation can effectively regulate the problems of union organization and collective bar-

gaining with respect to a vessel operating in international trade (U. S. Br., 32-37); that, as in the decision of this court in *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), the Act should be construed to recognize the need for comity and reciprocity in relation to international maritime commerce and for avoiding conflict with international usage (U. S. Br., 37-46; U. K. Br., 6-7; Lib. Br., 6-7; Pan. Br., 7-8; Can. Br., 14-18; Hon. Br., 9-10); that this comity and reciprocity in international maritime commerce require honoring the traditional maritime principle that the law of the flag nation governs the internal affairs of a vessel (U. S. Br., 41-45; U. K. Br., 4-7; Lib. Br., 7-15, 17; Pan. Br., 9-13; Can. Br., 11-14; Hon. Br., 10-14); and that the assertion of NLRB jurisdiction over these vessels, in disregard of the established principles of international law, would disturb international relations with friendly maritime nations (U. S. Br., 47-50; U. K. Br., 1-2, 4; Lib. Br., 6, 7, 10; Pan. Br., 6, 8, 19; Can. Br., 18-26; Hon. Br., 6-7, 14, 17).

We submit that the propositions of law, stated in these briefs, all of which are urged by us in our Main Brief, 22-27, 38-47, are in accord with controlling decisions of this Court, are decisive of the questions here presented and call for reaffirmance of the long standing rule of flag law under which international commerce by water has grown and been conducted. All nations have long relied on this rule of law. Ships under the flags of all nations have come to our great seaports in reliance upon the respect that will be accorded to the flag and to the integrity of the internal order of these ships.

We cannot accept the suggestion of the United States that the two ships of the Ineres Line are registered under "true flags of convenience" (U. S. Br., 5, 54). We know of no reason why owners of one nation may not invest in ships to be operated under the flag of another nation. It has long been common practice in the maritime world. The expression used, whatever usefulness it may have in other contexts, has no legal significance and scarcely advances analysis of the legal questions here presented.

We know of no legal significance to the point made by the United States that the Ineres Line ships are neither engaged in the commerce of Liberia, the flag country, nor have any operational contacts with it (U. S. Br., 54). The United States cites no authority in support of the legal significance of this point. In terms of the facts of international maritime commerce, the point is mischievous and, if accepted and given legal significance, would, we submit, introduce discord and constant controversy between maritime nations, new and old. It is common knowledge that ships which fly one nation's flag frequently are put to use in trade between other nations. In the brief filed herein by the United Kingdom (U. K. Br., 5) it is pointed out that Norway, with a population of about three and a half million, contributes about twelve million gross tons of shipping to the carriage of cargoes in international trade. Many of the ships of such a nation operate seldom, if at all, in the trade of the flag country. Many of such vessels rarely, if ever, see their home ports.

The principle that the law of the flag nation governs the internal affairs of a vessel (U. S. Br., 41-45) has no qualification, such as seems to be suggested by the United States.

The legal status of a ship is surely not to be dependent upon the particular trade it is serving on any given voyage or perhaps on the origin or destination of the cargo it is carrying at any given time.

III. Respondents' Assertion That Application of the Labor Act to Incres Vessels Will Not Detract From Their Liberian Nationality or Interfere in Their Internal Order Is Wholly Erroneous in Fact and Law.

It is astounding to read in respondents' brief, 46-51, that application of the Labor Act would not detract from the vessels' Liberian nationality or interfere in their internal order.

Respondents say that the Act does not compel the inclusion of any specific terms in a bargaining agreement, but merely encourages private collective bargaining which they urge, is no interference in the internal order of a ship (Resp. Br., 50-51). Respondents forget that collective bargaining is itself an important part of the internal order of a ship.*

Their argument here is a transparent *non sequitur*. Even a cursory look at the Act reveals that it regulates almost every conceivable aspect of labor relations other than the actual rates of pay and working conditions agreed upon.** It regulates these matters at all times and in all

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* The charge filed with the NLRB by respondent IMWU against petitioner on May 13, 1960 charged a violation of Section 8(a)(5) by refusal to recognize and bargain in good faith with the union (Def. Ex. A, R. 27). The charge has been on file for over two and one half years without any action by the Office of the General Counsel.

** For example, if a captain were to dismiss a crew member and a charge were filed with the NLRB that the dismissal was for union

(Continued on page 6)

places, wherever the ship may be. Without more, the very nature of the Act renders it inapplicable to any foreign flag vessel. For example, the basic and essential discipline on shipboard would be directly affected by this Act, if it is held to be applicable to these ships, because even the possibility that the master may have to defend his disciplinary acts against attack under United States law is itself an interference with shipboard discipline.*

(Continued from page 5)

activity and constituted a violation of Section 8(a)(3), the NLRB would rule on the validity of discharge. Section 10(c) empowers the Board to order the crew member reinstated to his former rank with back pay.

In fact, Sections 7, 8, and 9 of the Act govern the rights and conduct of employers and employees in all aspects of labor relations, including representation questions and limitation of employers in influencing employees on such questions or in intervening in union affairs as well as employees' rights with respect to strikes, picketing and other coercive measures and to compel collective bargaining. Section 9(b) empowers the Board to determine the appropriate bargaining unit.

The fact that the Act governs the rights of employees to strike, picket, or otherwise interrupt shipboard operations and that it compels an employer to bargain solely with an NLRB certified union may be the most dramatic examples of interference in a ship's internal order.

Section 9(c) governs when a union may seek certification and Sections 8 and 9 govern the validity and effect of bargaining contracts. For example, Sections 8(a)(1) and 8(a)(2) make validity dependent on circumstances under which the collective bargaining contract was executed, and Section 9 and connected administrative rules regulate the effect of a contract as a bar to an election petition and its effect under Section 8(b)(7)(A) as a bar to recognitional and organizational picketing.

The Act prohibits the inclusion of specific provisions in bargaining contracts, for example, Section 8(e) prohibits "hot cargo" clauses and Section 8(a)(3) certain union security clauses.

* The views of counsel for respondents are shown in a question asked of the Captain of the NASSAU. He was asked whether he knew that "the Union can challenge the Captain's right to fire a person" (R. 155). Objection to this question was sustained (*ibid.*).

The laws of Liberia, the flag country, are comprehensive in the regulation of the ship itself.* It has a growing body of law on wages and hours, repatriation and care of sick or injured seamen and unionization.** These laws reflect the policies of the Republic of Liberia and if they differ from those of the United States, so do the laws of other maritime nations. They are due the respect and recognition that is accorded the laws of any other nation.

It is equally astounding to read that the internal order doctrine is inapplicable because here industrial strife involving foreign seamen "spilled over from the vessels onto the docks" (Resp. Br., 49-50). So far as the facts are concerned, respondents seem to be saying that if they interfere hard enough and successfully with the internal order so that the crew members walk off the ship and spill onto the dock, then the union conduct has ceased to be an interference with the internal order and has become something else!

On the law, there is no such limitation to the doctrine. *Wildenhus's Case*, 120 U. S. 1 (1887), cited by respondents (Resp. Br., 49), applies the internationally accepted principle that where shipboard crimes affect the peace of the port no principle of comity or international law forbids the coastal state from suppressing the crime and punishing the criminal. The fact that respondents themselves urged the crew members of the NASSAU to desert their ship in violation of their seamen's articles and were the cause of the fact that the controversy "spilled over from the vessels onto the docks" (R. 14, 177-180, 183) (actually the VICTORIA was at all times anchored offshore and her crew, though they de-

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* See Lib. Br., 7 and Appendix A, 19.

** Lib. Br., 7.

serted their duties in violation of their articles, remained on board) illustrates the error in respondents' argument. For their argument, if followed to its logical conclusion, is that the Labor Act is applicable any time respondents involve themselves in the labor relations of a foreign ship. The question here is whether or not the Labor Act governs the labor relations of Incres ships. It is not relevant to this question that the crew of one of them deserted their ship in response to pressures of respondents.

The scope of internal order as a matter of law and its coverage of relations between master and crew is stated in our Main Brief, 42-47. See also the recent study, Boczek, *Flags of Convenience: An International Legal Study*, Harvard University Press, 1962, pp. 172-74, and *Simpson* v. *Hamburg-American Line*, 1939 Am. Mar. Cas. 1469, 1480 (D. Canal Zone, 1939).

IV. Respondents Are in Error As to the Applicable Rules of Statutory Construction.

A. *Congress Has Expressed No Intent to Apply the Labor Act to Foreign Flag Vessels.*

Respondents seek to put aside the territorial canon of construction urged by petitioner as having no place because Congress has expressed its intent in the language of the Act itself (Resp. Br., 35).

We deem this argument to be frivolous in view of the decision of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 142 (1957) in which determination of Congressional intent was deemed to be necessary to determine the scope of the Act.

Respondents attempt to distinguish the *Benz* case urging "the critical significance in the *Benz* holding of the

transient or temporary connection with American commerce" (Resp. Br., 27). This distinction is exposed by respondents themselves. They admit that the Labor Act would "undoubtedly" and "unquestionably" be inapplicable to a vessel such as the QUEEN MARY "even though the vessel regularly calls at American ports" (Resp. Br., 22-23). Thus, in spite of their four-page argument that the *Benz* case hinged on the vessel's temporary or transient connection with American commerce, respondents have to admit that a case in which a vessel is regularly and frequently in American commerce would be decided the same way as the *Benz* case.

B. *The Territorial Canon of Construction Has Been Consistently Applied to American Labor Legislation, As We Show in Our Main Brief.*

Respondents seek to meet the force of the argument on pp. 25-26 of our Main Brief by contending that our citation of two air line cases was erroneous (Resp. Br., 36).

In the two cases cited by us the Railway Labor Act was sought to be applied to air line employees. The decisions in both cases found that Act lacking in explicitness with respect to the scope of its application to air line employees. Both decisions were based on and employed the territorial canon of construction that "explicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially," as stated in *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685, 690-691 (D. C. Cir.), *cert. denied*, 342 U. S. 849 (1951) and "unless there is an explicit and unequivocal showing o[illegible] contrary intent. Acts of Congress are to be given an interpretation which is domestic in nature" as stated in *Air Line Stew-*

ards, Etc., Ass'n v. Northwest Airlines, Inc., 267 F. 2d 170, 178 (8th Cir.), *cert. denied*, 361 U. S. 901 (1959). In both cases the courts cited the territorial canon as stated in *Foley Bros. v. Filardo*, 336 U. S. 281 (1949). The two circuit courts specifically ruled that the interwoven structure of the Act and the amendments respecting air transportation did not supply such explicitness.

C. *When Congress Has Legislated With Respect to Foreign Vessels Its Intention to Do So Has Been Clearly Expressed.*

Again, respondents seek to meet the force of the argument on pp. 27-29 of our Main Brief as to Congressional practice in legislating as to foreign flag vessels by pointing to the Jones Act* and three sections of the Merchant Seamen's Acts which we had not noted. None of the sections which we did note are controverted.

Respondents are correct in stating that in none of these three sections is there explicit application of the provisions to foreign flag vessels but the sections cited by respondents, 46 U. S. C. §§593,** 594,*** 596**** have a similar

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*The Jones Act is discussed in our Main Brief, 37. See also U. S. Br., 53.

** Section 593 provides for payment of earned wages and transportation of seamen to the place of shipment upon loss or wreck of their vessel.

*** Section 594 provides for payment of seamen's wages in certain cases where seamen are discharged in breach of their articles. It does no more than provide a remedy in the court of the forum selected and the measure of damages to be applied to such a breach of articles. See *Zarraga v. Texas Company*, 284 F. 2d 657 (3rd Cir. 1960).

**** Section 596 gives seamen the right to their wages within a stated time after arrival in port.

subject, seamen's wage claims, and a common purpose to assure that seamen do not arrive penniless in a strange port and thereby burden the local community. *Marromatis v. United Greek Shipowners Corporation*, 179 F. 2d 310, 315 (1st Cir. 1949).

This same purpose carries through other contiguous sections of the Seamen's Acts which deal with wages and which apply expressly to foreign seamen.* The likeness of all these contiguous seamen's wage provisions indicates a Congressional purpose that they be read together and the coverage of foreign vessels expressed in some be treated as indicative of a like coverage of the others. The Fourth Circuit did exactly this in *The Sonderborg*, 47 F. 2d 723 (4th Cir.), *cert. denied*, 284 U. S. 618 (1931), cited by respondents at page 40 of their brief to show application of an Act to foreign ships without any expression of Congressional intent. In that case, the court noted at page 726 that "'. ... the statute [46 U. S. C. §596] ought not to be construed [to apply to foreign seamen aboard a foreign ship] unless it plainly appears that this was the intention of the Congress,' ". It found such clear intent to exist because Congress intended that Sections 596 and 597 be read together, *id.* at 727.

Finally, respondents point to the application to a foreign vessel of a domestic statute limiting shipowners' lia-

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* Section 597 (46 U. S. C.) grants seamen on both domestic and foreign vessels the right to receive one-half of their earned but unpaid wages while their vessels are in American waters.

Section 599 (46 U. S. C.) prohibits the payment of advances and certain allotments to seamen on both domestic and foreign vessels. This section protects seamen against many schemes historically employed to defraud seamen of their wages; see generally *The Eclipse*, 53 Fed. 273 (N. D. Cal. 1892).

bility in *The Scotland*, 105 U. S. 24 (1882). The statute as then worded (9 Stat. 635 (1851)) applied to "any vessel." Respondents imply that, by analogy, the general language used in the Labor Act should be construed to apply to foreign seamen aboard foreign vessels. This Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) referred to the decision in *The Scotland* and stated the error in such an analogy:

> "The limitation-of-liability statute was construed to thus apply [to a foreign vessel] only against those who had chosen to sue in our courts on foreign transactions. Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not." *Id.* at 591-592.

D. *The 1959 Amendment to the Labor Act Furnishes No Support to Respondents.*

The contention of respondents is that the 1959 amendment to Section 14(c)(1) of the Act, 29 U. S. C. §164(c)(1), though "directed primarily at filling the no-man's land" in the Act (Resp. Br., 42), "practically requires the Board to assert jurisdiction over foreign flag vessels" in the circumstances urged by respondents (Resp. Br., 41).

This same contention is made by the Board in cases Nos. 91, 93 and 107 (Board Br., 43), and is answered in the brief of the United States (U. S. Br., n. 8, pp. 40-41). We join in the "short answer" of the United States to this contention.

7. Factual and Conclusory Statements of Respondents Are Erroneous and Unsupported.

We have selected the following factual assertions in respondents' brief as warranting correction, though we deem them to be not relevant to the questions presented:

1. Respondents state that "from 39 Broadway Bergeri [president of petitioner] and Wolfson [president of Cheres Line Agency, Inc.] handle or oversee passenger bookings, provisioning, arrangements for arrival and departure, inspections, fueling, advertising, repairs, cargo and other husbandry details" (Resp. Br., 6).

The foregoing ignores Cosmopolitan Shipping Corporation, agent for a number of lines, which acts as ships' husband when the ships are in New York. This includes handling and overseeing fueling, loading, docking and disembarkation of passengers, hiring of linesmen, tugboats and pilots (R. 58, 61, 172, 175).

Respondents seek to lump the petitioner Line with the agency and ignore their separate functions in the orderly conduct of business (see our Main Brief, 4, 9-10).

2. Respondent's point to Wolfson's verification of the complaint and moving affidavit as "a striking demonstration of the unity of interest and relationship" between petitioner Line and the Agency (Resp. Br., 6).

The fact is the opposite. In his affidavit Wolfson stated that the reason he did this was that petitioner, a Liberian corporation, had no office or place of business within the United States and no officer of petitioner was then in the United States (R. 12).

Respondents, still in search of unity between the two, assert that the two corporations are "cemented together

by interlocking officers and directors" (Resp. Br., 7). The plain fact is that only Berlingeri is an officer and director of both corporations (R. 59-60). This is the same record citation used by respondents in support of their assertion of plural interlocking. They lay stress on the fact that a technical inspector employed by Ineres "maintains his desk at 39 Broadway" (Resp. Br., 6), but do not mention that he was present in New York specially to inspect extensive alterations to the VICTORIA made in Rotterdam the year before carrying a one year's guarantee (R. 81).

3. Respondents assert, as if the points had been litigated below and were relevant, "that Ineres seamen belong to no union, are paid substantially less than Italian union scale and have serious differences with Ineres" (Resp. Br., 5). These categorical statements are supported by references to the testimony of the Captain of the NASSAU. So far as he had knowledge of such matters he testified that the Ineres seamen's contract "was approved by the Italian union" (R. 164). Wolfson's affidavit is the same (R. 13) and, in addition, Wolfson stated upon information and belief that at all times since such approval "a large proportion of the crews have been members of that union" (R. 13). The Captain did not contradict this. He testified that "as far as I know" the members of the crew were not represented by a union (R. 163-164). Of course, these points were irrelevant below and are not developed in any detail in the record.

4. Respondents assert that "labor relations matters are similarly dealt with from 39 Broadway" (Resp. Br., 6).

The fact is that the crews are recruited and hired in Genoa (R. 55, 56, 105). The wages, terms and working conditions are agreed to there (R. 56, 118), and the final contract is approved by an Italian union (R. 13, 164). Dis-

ciplinary actions taken are the sole responsibility of the ship's captain (R. 155, 156). Moreover, it is clear that Wolfson had no authority to negotiate with respondents when the interferences started (R. 211). Necessarily when the interferences in New York began, they had to be dealt with by someone in New York rather than the owners in Genoa, but when problems between Ineres and respondents arose at a time when no officer of Ineres was in the country, their resolution had to await the arrival in New York of Berlingeri (R. 211).

5. Respondents assert that the two ships are operated "exclusively in United States commerce" (Resp. Br., 47). Clearly, however, both ships are operated in international commerce, not exclusively in United States commerce. Vessels operating in international commerce are necessarily operating in the foreign commerce of at least two and often more than two countries. See, *e.g.*, *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, 300 F. 2d 222, 224, *cert. granted*, 370 U. S. 915 (1962) and our Main Brief at 36.

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Respectfully submitted,

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